IN THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND.

OSMOND-BARRINGER COMPANY *v.* EVA A. HEY.

1. Conditional Sale—Reservation of Title.—Conditional sales contracts are universally recognized, and upon violation of a condition the owner may retake possession.

2. Case at Bar—Title—Fraud.—The title or possession of the property in the case at bar was not acquired by fraud or a criminal act because the plaintiff intentionally dealt with the party to whom it delivered the car and it was on him that it relied, not the name he gave.

3. Breach of Conditional Sale—Property in a Foreign State—Innocent Purchaser.—While in process of execution, the conditional sales agreement was breached, the property being moved from the State of North Carolina to Virginia and here sold to the defendant, who was an innocent purchaser for value.

Held, that the registration of the contract in North Carolina preserved the title to the vendor as against creditors and subsequent purchasers provided the conditions of the contract were not complied with.

4. Conditional Sale—Removal of Property—Conflict of Laws—Recordation.—The conditional sales agreement was never recorded in Virginia, as required by Section 5189 of the Code of 1919, though it was validly recorded in North Carolina.

Held, The agreement, being validly recorded in North Carolina, the plaintiff is entitled to the same reservation of title that he had under the law of North Carolina and may retake possession of the property.

5. Code of 1919—Conflict of Laws—Conditional Sale—Title—Case at Bar.—Section 5189 of the Code of 1919 requiring the recordation of conditional sales agreement, does not apply to property removed into this State where validly recorded in the State where situated. This statute was enacted to protect purchasers in intrastate movements of property and not interstate movements of property. Under comity between States, the conditional sale agreement valid in a foreign State will be enforced here.

6. Conditional Sale—Chattel Mortgage—Section 5197 Code of Virginia—Conflict of Laws.—Section 5197 of the Code requiring that "no mortgage, deed of trust, or other encumbrance" upon property in another State shall be valid as to subsequent purchasers in Virginia upon removal of property here unless recorded, does not embrace a foreign conditional contract sale.

7. Estoppel.—The plaintiff is not estopped from relying upon his title even though he gave another possession.

8. Case at Bar—Remedy.—The *lex fori* is controlling in all matters pertaining to the remedy. Judgment for the unpaid purchase price, or, in the alternative, the property, as required by Section 5801 Code of Virginia

George Bryan, Alexander H. Sands and *Hamilton Burnett,* for plaintiff.

J. M. Turner and *Haskins Hobson,* for defendant.

On March 15, 1920, one purporting to be G. C. Short, of Asheville, N. C., purchased of the Osmond-Barringer Company, of Charlotte, N. C., an Essex Touring Car. The purchase was made under a conditional sale agreement whereby the person representing himself as Short paid a certain sum of money down, and executed notes for the balance of the purchase price to be paid monthly. The conditional sale agreement was validly recorded at Charlotte according to the laws of North Carolina. The purchaser brought the car to Richmond, Virginia, and sold it to Eva A. Hey, a resident of Richmond. Whereupon the Osmond-Barringer Company instituted detinue proceedings against Eva A. Hey in the Law and Equity Court of the City of Richmond.

CRUMP, J.

In this case, which was tried before and submitted to the Court without a jury, my conclusions are:

1. That the sale by the plaintiff to G. C. Short was under a contract which is to be properly classed as a conditional sale contract, by which the seller of the personal property reserved the title to himself until the conditions of the contract were fulfilled, with the right to retake possession if any of the conditions were violated by the purchaser. Such contracts are now in universal use and recognized by the common jurisprudence of the country and are regulated by statute law.

2. I do not think the title to or the possession of the automobile was acquired by Short by fraud or by a criminal act, so far as this case is concerned. Title he never had, because it was expressly reserved by the seller. Possession was intentionally delivered to him by the plaintiff, and he was entitled to it under the terms of his agreement with the plaintiff. He did not simulate the identity of some person known to the plaintiff, in order to obtain the credit which the plaintiff would have extended to that person, when he gave his name as G. C. Short. They would have dealt with him under any other name just as readily. They intended to deal with the identical person who was known to them by that name at the time.

3. The conditional sale contract was executed in North Carolina between apparent residents of that State, relative to property located there and its registration under the laws of that State preserved the title to the seller as against creditors and subsequent purchasers from the buyer, in the event the conditions of the contract were not complied with, or were violated by the buyer; among the conditions was one to the effect that the automobile should not be removed from the State of North Carolina.

4. While the contract was in process of execution, and, before its conditions had been complied with, the buyer removed the automobile from the State of North Carolina to Virginia, and having the possession of it, and representing himself to be the complete owner of it, sold it to the defendant, who was an innocent purchaser for value without notice of the conditional sale contract.

5. Under these circumstances an innocent purchaser in North Carolina would have acquired neither title nor right to possession as against the plaintiff here. The contract was never recorded in Virginia, and the real question at issue is whether the plaintiff is entitled to the same reservation of title and the right to retake possession, as against the purchase in Virginia. The doctrines of the common law relative to the right to transfer the title to personal property by a person who has possession only under a sale which is conditional and in which the title has been reserved, are well settled, are recognized in Virginia, and need not be stated. In McComb *v.* Donald, 82 Va. 903, it was held that the sub-vendee from a purchaser under a conditional sale contract in which title was reserved until the purchase money was paid could not acquire title or ownership, although without notice of the contract; and it was also there held that section 5 of chapter 114 of the Code of 1873 by which deeds of gift, deeds of trust, or mortgages of chattels are void as to subsequent purchasers unless recorded, did not apply to the case in hand, as a conditional sale was not included within the purview of that statute, the Court distinguishing between a conditional sale contract and a chattel mortgage. By our present statute law (Code 1919, section 5189) a conditional sale contract is required to be recorded, else a subsequent purchaser without notice acquires a good title. It cannot be correctly said that legislation requiring recordation or docketing was enacted in consequence of the decision in McComb *v.* Donald, because the first statute on the subject was passed in 1883-84—Monarch Laundry *v.* Westbrook, 109 Va. 382. Although McComb *v.* Donald was decided in 1886, the contract under re-

view in the case was made in 1881, so that this first statute did not apply to the case; this decision did no doubt influence subsequent amendments.

6. The transactions under review in the case before me took place in the spring of 1920, and therefore the statutory law in the Code of 1919 is applicable, in so far as the case may be governed by Virginia legislation. It is manifest that section 5189 of the Code was intended to apply and does apply primarily only to writings executed in the State of Virginia, relative to chattels at the time located in some county or city in this State. Virginia legislation could not have any effect beyond the limits of the state, and therefore this statute could not apply to a contract executed in North Carolina with respect to a chattel located in that State, unless perhaps the parties agreed upon and anticipated its removal to this State, which is not the case here.

The vital question therefore upon which the case at bar turns is this:—Upon the removal of the automobile to Virginia by Short, was it essential for the protection of the plaintiff that the contract of sale should be recorded in this State under section 5189, or on the other hand, did the protection following upon compliance with the registry law of North Carolina follow the removal of the property to this State without the knowledge or consent of the plaintiff, so that the sale to the *bona fide* subsequent purchaser here was ineffectual against the plaintiff. After careful examination I am constrained to the conclusion that recordation in Virginia under the circumstances disclosed in the evidence was not essential, and that the sale to the defendant did not carry to the defendant the title to the automobile. In Craig *v.* Williams, 90 Va. 500, it was held that a chattel mortgage executed in another State with reference to property located there and duly recorded in that State, need not be recorded in Virginia upon removal of the property to this State, no Virginia statute requiring a foreign mortgage to be recorded here; it was further held that, under the comity between the States, the lien of the mortgage accompanied the chattel upon removal to Virginia and could be enforced here. The principles enunciated in this case are in conformity with the general law prevailing throughout the country by the weight of authority. 5 R. C. L. 987; Minor Conflict of Laws, p. 307.

In 5 R. C. L. 991, being section 72 of the article on Conflict of Laws it is said:

"With reference to conditional contracts of sale the weight of authority is in accord with the rule with reference to chattel mortgages, and is to the effect that, unless the local law of the

State into which the property is removed with reference to filing or recording such contracts expressly applies to contracts made out of the State with reference to property subsequently brought into the State, compliance therewith is unnecessary in order to protect the vendors after the removal of the property."

This statement as to the weight of authority seems to be universally agreed to wherever the cases on the subject are discussed. See Note, 64 L. R. A. p. 833; Case & Note, 35 L. R. A. (N. S.) 385; Note, L. R. A. 1917 D, p. 944; Ann. Cases 1916 A p. 882; Williston on Sales sec. 339; I Mechem on Sales sec. 649; 2 Elliott on Contracts sec. 1154 et seq.

Mr. Minor, in his Conflict of Laws, section 130, treats this subject briefly and while his views are not very clearly stated I do not understand him to differ from the other authorities. Many cases were cited before me by counsel in argument and most of them are referred to by one or more of the commentators in the above authorities.

7. Is there any legislation in Virginia from which the requirement can be fairly inferred that the North Carolina conditional contract of sale should be recorded in Virginia, under the circumstances of this case, in order to protect the original seller against a subsequent purchaser in this State? Section 5197 of the Code is relied upon as having this effect. This section requires that "no mortgage, deed of trust, or other encumbrance" upon property in another State shall be valid against subsequent purchasers in Virginia, upon removal of the property to this State, unless such instrument is recorded in Virginia. In Craig *v.* Williams, 90 Va. 55, (decided in February 1894) a chattel mortgage was executed in South Carolina and the property subsequently removed to Virginia, where attachments were levied upon it by creditors of the mortgagor. The mortgage was not recorded in Virginia. In the ensuing contest between the attaching creditors and the mortgagees, in which the mortgagee was the appellant in the Court of Appeals, the Court states the contentions of the respective parties as follows:

"The appellant insists that the law of the place of the contract, where this is also the place in which the mortgaged property is situated at the time of the mortgage, governs as to the validity, construction, and effect of the mortgage, which will be enforced in another state as a matter of comity, although not executed or recorded according to the requirements of the law of the latter State. On the other hand, the appellees insist that the laws of other governments have no force beyond their

territorial limits, and if permitted to operate in other States, it is upon the principle of comity, and only where neither the State nor its citizens would suffer any inconvenience from the operation of the foreign law."

The Court then discusses the positions taken by the parties and rules with the appellant, concluding as follows:

"If the mortgage be duly recorded in the State where it was executed, and the mortgagor afterwards takes the property with him to another State, no registration of the mortgage is necessary, unless made so by positive statute of that State * * * (authorities cited). There are decisions to the contrary, to which we have been referred, and which we have considered, but the general rule is as stated in the foregoing authorities. We have no express statute in Virginia requiring foreign mortgages to be recorded and the weight of authority is that in such case our recording acts do not apply to them."

Section 5197 of the present Code was originally exacted to meet the ruling in this case. It is plainly impossible to construe this statute so as to make it embrace a foreign conditional contract of sale. The language of the statute, and its position in the sequence of sections in the chapter of the Code in which it occurs, demonstrate that it was intended to apply to liens or encumbrances such as deed of trust or chattel mortgages. For a definition of encumbrances see the word, "Incumbrances", in Words and Phrases Judicially Defined. As pointed out above it has been held in Virginia before this statute was passed that the expression, "chattel mortgage", in a statute did not include a conditional contract of sale. I do not think therefore that there is any Virginia statute which required the North Carolina contract of sale to be recorded in Virginia.

8. I do not think that the circumstances of this case justify a conclusion that the plaintiff is estopped from relying upon his title because, while he had a right to entrust the purchaser with the possession of the automobile, he yet placed in the purchaser the means of defrauding the defendant here. The paper containing the terms of settlement was evidently marked or stamped paid by Short himself, and it was Short's own wit and sharp practice that deceived the defendant.

9. While judgment must therefore go for the plaintiff, that judgment should be for the unpaid amount due under the contract of sale, or in the alternative for the automobile, as required by section 5801 of the Code.

The *lex fori* necessarily governs in affording the remedy.

While the result in this case seems to bear harshly upon the defendant, yet one of the two innocent parties must suffer, and

the precedents of the law plainly point to the conclusions which I have reached.

Note.

Validity of Conditional Sales.—The ordinary form of a conditional sale contract is one in which the vendee is given possession of the chattel upon his making a small payment towards the purchase price, agreeing to pay the balance in monthly, quarterly or annual installments. The title to the chattel is expressly reserved in the vendor until payment is made in full. At present, contracts of this kind are in universal use and recognized by the common jurisprudence of the country. Even though they are regulated by statute law, we find a number of nice legal questions arising out of them. Probably the first recognition we find in the books of a conditional sales contract is in Shepard's Touchstone, in which the following suggestive paragraph appears:

"It is a general rule that when a man hath a thing, he may condition with it as he will. A contract or sale of a chattel personal, as an ox or the like, may be upon condition, and the condition doth always attend and wait upon the estate or thing whereunto it is annexed; so that although the same do pass through the hands of 100 men, yet it is subject to the condition still." *Touch.* 118.

In contracts of this kind where the party in possession of the goods fraudulently sells them to a third party, we come upon the principle, that where one of two innocent persons must suffer from the fraud of a third, the loss should fall on him who has enabled such third person to do wrong. This is very ably answered in the following quotation from the opinion of Judge Hinton in McComb *v.* Donald's Adm'r, 82 Va. 903:

"It is urged, however, by the advocates of the contrary doctrine, that as possession is one of the evidences of title, the vendor, who has furnished the vendee with this *evidence* of ownership, and thereby has given him a false credit, should suffer for the fraudulent acts of such vendee, rather than the purchaser, upon the principle that where one of two innocent persons must suffer from the fraud of a third, the law should fall on him who has enabled such third person to do the wrong. But the ready and conclusive answer to all this, apart from the consideration that there is 'no good reason or equity in placing the burden of a fraudulent sale by a vendee, in violation of the condition on which he received the property, upon a *bona fide* vendor, rather than upon a *bona fide* purchaser,' would seem to be that the creditors and purchasers, in such cases, are not, in the legal sense of the term, *innocent* creditors or purchasers. Mere possession is not, and never has been held to be, *proof* of property. It is only one of the three elements of title. And it is within the common experience of every one, that the possession of personal property is often in one person while the title is in another; as for example, in a case of lending or hiring, or where materials have been left with a manufacturer to be made up; and yet, in each of these cases, the law, as well as the dictates of common prudence, requires that third persons, before purchasing, shall inquire in what capacity his vendor holds the property, whether as a buyer, borrower, hirer, or in some

other capacity; and if the purchaser fails to do his duty in this respect, then justice requires that the loss should fall upon his own, and not upon another's head."

In the case of Osmond-Barringer *v.* Hey, *supra,* counsel for the plaintiff relied on Cundy *v.* Lindsey, 3 App. Cases, 459, while counsel for the defendant contended that the case of Old Dominion S. S. Co. *v.* Burkhardt, 31 Gratt., 664, controlled. But in the Burkhardt case it was further expressly held that where title was reserved—if there has not been a contract of sale but only a transfer of possession, to become a contract of sale when payment is made, the person in possession has no title to the chattel and can, therefore, convey none to an innocent purchaser, and the owner may recover the chattel.

In Fischer *v.* Lee, 98 Va., Judge Riely seems to recognize the same distinction. He says on page 165:

"There was absolute sale of the pianos by Fischer to Lee, and the delivery of possession before the creation of the pledges. There was *no reservation of title* by Fischer, nor creation of any lien for unpaid purchase money. There is no doubt of the fact that there was an absolute parting by Fischer with all right of property in the pianos. It was not the case of a parting with the mere possession and not the title, *in which case Lee would not acquire and could not transfer title to the property.* Steamship Co. *v.* Burkhart, 31 Gratt. 664; Williams *v.* Given, 6 Gratt. 268."

Vendor May Reclaim Goods Fraudulently Purchased.—From examination of these authorities it will be seen that the question turns on whether or not the contract is void or voidable. Where a contract is voidable only, and the vendor has the right to affirm or repudiate the transaction, there may *elapse a quasi* title in the fraudulent vendee, and until repudiation he has such an interest or estate in the chattel as to enable him to pass the same on to a *bona fide* purchaser. On the other hand, where the fraud committed is of a tortious nature, the breach of a reservation of title, or where the circumstances are such that it was not intended by the vendor that the title should pass, the contract is void *ab initio.* See Note by Mr. Freeman, 33 Am. Dec., 702; Moody *v.* Blake, 117 Mass. 23; Hamlet *v.* Letcher, 37 Ohio 356; Wychoff et al. *v.* Vicary, 75 Hun. 409, 27 N. Y. Supp. 103.

Can Larceny Be Committed by Party in Possession?—"We think the law well settled, that where a person obtains the goods of another by lawful delivery, without fraud, although he afterwards converts them to his own use, he is not guilty of felony; but if such delivery be obtained by any fraud or falsehood, and with an intent to steal, though under pretense of hiring, borrowing, or even purchase, where no credit is intended to be given, the delivery in fact by the owner will not pass the legal possession, so as to save the party from the guilt of larceny. Adopting these conclusions, the Judges are unanimous in overruling the application for a writ of error." Summers, J., in Starkie *v.* Comm., 7 Leigh 752.

And in Williams *v.* Givens, 6 Gratt. 268, Baldwin, J. says:

"It is very clear that a purchase of goods from the owner, by means

of a deceit as to the genuineness or value of the consideration paid, is not a theft but a cheat. It is essential to a larceny, that the property be taken without the consent of the owner, which cannot be in the case of a sale perfected, however fraudulently that consent may have been obtained. Numerous cases, it is true, have occurred in which persons have been convicted of larceny who acquired possession of the thing by the consent of the owner, fraudulently obtained, for the purpose of enabling the offender to appropriate it feloniously; but in all such cases, the owner has consented to part with the possession only, and not the property. The true distinction, in the language of an accurate writer, is, 'that if by means of any trick or device, the owner of the property is induced to part with the possession only, still meaning to retain the right of property, the taking by such means, will amount to larceny; but if the owner part not only with the possession of the goods, but the right of property in them also, the offence of the party obtaining them, will not be larceny.' 2 Russ. Crimes 28." Richards *v.* Comm., 13 Gratt. 803; Johnson *v.* People, 113 Ill. 99.

One Can Pass No Better Title Than He Himself Has.—It was held, in Summer *v.* Woods, 67 Ala. 139, 42 Am. Rep. 104, that a purchaser of personal property from one in possession under a sale upon unfulfilled conditions, gets only the conditional title of his vendor, *although he buys in good faith and without notice. Somerville, J.* said:

"We consider it settled by an overwhelming preponderance of the decisions that where there is an express stipulation in the sale of personal property, that the property shall not be the vendee's until the price is paid, the title does not pass, the transaction being a mere conditional sale. And that a *bona fide* purchaser of such property acquires only the conditional title of his vendor, and cannot be protected against recovery on suit brought by the original vendor and owner of the legal title. The fact that the first purchaser, or second vendor, was at the time of sale in possession of the property does not change the principle. It is a question of right and not notice, and the maxim of *caveat emptor* applies with as much force as in cases of ordinary bailments. The principle of course does not obtain where the condition has been expressly or impliedly waived by the vendor, or he has done or suffered anything by reason of which the purchaser from the vendee has been misled." (Citing authorities.)

Cf. McComb *v.* Donald's Adm'r, 82 Va. 913; Straus Pritz & Co. *v.* Hirsch, 63 Mo. App. 102; Marvin Safe Co. *v.* Norton, 48 N. J. Law 422, 57 Am. Rep. 566, and note.

It is said in McComb *v.* Donald's Adm'r, *supra:*

"Now, that the contract between Donald and the firm of McCoy and Saunders was a conditional sale seems to us to admit of no doubt. (Citing authorities.) And in such cases, the courts have very generally held, in accordance with the common law principle, which construes contracts, not in contravention of the law, according to the intention of the parties, that the payment of the purchase money is a condition precedent on the part of the buyer to the vesting of the title, and that the property in the goods to be sold does not pass to the buyer until that condition has been fulfilled. (Citing authorities.) And if such sales are held to be so, as between the original vendor and vendee, in Massachusetts, Connecticut, New Hampshire, Vermont, Maine, Missiouri, Indiana, Iowa,

Ohio, Michigan, Georgia, New Jersey, and with some lack of uniformity, in New York also, it seems to us inevitable that they must be valid as against purchasers from, and creditors of, the vendee; and that the decided weight of American authority is in favor of this view." (Citing authorities.)

Section 5197 Code of Virginia.—Judge Crump, in Osmond-Barringer *v.* Hey, above, decides that Section 5197 of the Code of Virginia does not include a conditional sale in its requirement. For additional authority on this point, it was urged by counsel for plaintiff in their note of authorities that the maxim of *noscitur a sociis* is controlling, and that the Court of Appeals has already, in both the McComb case and that of Union Insurance Society *v.* Nalls, 101 Va. 613, passed upon the question.

Conflict of Laws.—"To hold that a citizen of Massachusetts who had acquired an absolute and perfect title to a chattel under the laws of that State (that State being at the time the situs of the property) can be defeated of his right by a tortious sale of the property under our own laws, upon the ground that we do not give effect to a sale or chattel mortgage as against creditors and subsequent purchasers, without a change in the possession, is more than we can accede to. The plaintiff comes into court in his own State, and which would at all times be protected there, and which was just violated there, by the wrongful act of Hamilton; and we think he should not come in vain." Bennett, J., Taylor *v.* Boardman, 25 Vt. 581.

In Weinstein *v.* Freyer, 93 Ala. 257, Clopton, J. said:

"We have found no case, and presume none can be found, where the reservation of title being valid by the law of the place where the parties resided, and the property was situated, it was decided that the owner was divested of his title by the removal of the property, without his knowledge, and its sale in another state." Shepard, et al. *v.* Hynes, 45 C. C. A. 271, 104 Fed. 449, 52 L. R. A., 675; Edgerly *v.* Bush, 81 N. Y. 199; Henderson *v.* Thayer, 5 Ok. Dec. 155, 2 Am. L. Rec. 670; Newsum *v.* Hoffman, 124 Tenn. 374, 137 S. W. 480.

The court will look to the substance of the contract, and the name by which the parties chose to call it will not affect its validity as against third persons. Arbuckle *v.* Gates & Brown, 95 Va. 802; Heyford *v.* Davis, 102 U. S. 235; Clark *v.* Bright, 30 Col. 199.